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IN THE

Supreme Court of the United States

OCTOBER TERM, 19~~60~~ 61

No. 59

SUZANNE THOMAS RICHARDS, nee Wadlow, individually and for the use and benefit of DEBRA SUE RICHARDS, *et al.*,

Petitioners,

—against—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. .....

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Petitioners,

—against—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

Suzanne Thomas Richards, Harvey Baruck, Clarine Farough, Bernice L. Maupin, Margaret J. Howe, Elizabeth R. Cross, Therese B. Akin, Althea S. Gates, Ruth Jean Carr-Harris, Anna Mae O'Neal, Margaret Emma Barron, Myra Fields, Virginia Hobson, and Josephine M. Schmyser, respectfully pray for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered herein November 25, 1960, affirming by a divided court, the judgment of the United States District Court for the Northern District of Oklahoma dismissing their respective complaints with prejudice on the ground that appellants had no actionable claims against the United States of America.

Opinion Below

No opinion was written by the District Court in dismissing the complaints. The judgment of the District Court was entered and filed January 18, 1960, and was based upon findings of fact, conclusions of law and order of judgment made by the Court. The opinion of the Court of Appeals, affirming the judgment of the District Court is not officially reported as yet.

Basis of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1), to review a judgment of the Court of Appeals dated and entered November 25, 1960, affirming the judgment of the District Court dismissing the complaints in the fourteen actions with prejudice.

Statutes Involved

The pertinent provisions of the Federal Tort Claims Act, 28 U. S. C. Sections 1346(b), 1402(b), 2672, 2674, the Oklahoma Wrongful Death Statute, 12 Okl. St. Ann. Section 1053, and the Missouri Wrongful Death Statute, Chapter 537, V. A. Mo. S. Section 537.080 (R.S. 1939, Sec. 3653), are set forth in the Appendix, *infra*, pp. 27-29.

The Questions Involved

Question 1

Do the provisions of the Federal Tort Claims Act, that the liability of the United States shall be determined in accordance with the law of the place where the negligent act or omission occurs, require the Federal District Court sitting in Oklahoma to apply the Oklahoma wrongful death statute to petitioners' wrongful death claims against the United States of America, where the deaths of decedents within the State of Missouri were caused by the negligent acts and omissions of the Government's employees which occurred within the State of Oklahoma?

Question 2

Although the liability of a private person in a wrongful death action brought against him in the courts of Oklahoma to recover damages for a wrongful death which occurred in Missouri as a result of his negligent acts and omissions which occurred in Oklahoma would be determined by the law of Missouri because (1) the Oklahoma conflict of laws rule would require such reference and (2) the Oklahoma wrongful death statute has no extraterritorial application to a death which occurs in Missouri, should not the courts below have been required by the provisions of the Federal Tort Claims Act to apply the Oklahoma wrongful death statute, under the same circumstances, to determine the liability of the United States of America in actions commenced against it pursuant to the provisions of the Tort Claims Act?

Statement of Case

On August 4, 1955, the decedents were riding on a regularly scheduled passenger flight of American Airlines, Inc. between Tulsa, Oklahoma and New York City. The airplane crashed in the State of Missouri, killing everyone on board.

Fourteen separate actions were commenced by the personal representatives or the widows of the decedents against the United States of America in the United States District Court for the Northern District of Oklahoma. The actions were brought pursuant to the provisions of the Federal Tort Claims Act, 28 U. S. C. §§1346(b), 1402(b) and 2671-2680. Jurisdiction of the District Court was based upon 28 U. S. C. §1346(b). Petitioners sought to recover damages under the Oklahoma Wrongful Death Statute, Title 12 Okl. Stat. Ann. §§1051-1054, for the wrongful deaths of their respective decedents. No cause of action or claim was pleaded in the complaints which sought recovery under the wrongful death statute of Missouri.

In their complaints, the petitioners alleged that the United States was negligent, acting through its Civil Aeronautics Administration employees, in permitting and failing to prevent and prohibit unsafe inspection, maintenance and overhaul procedures engaged in by American Airlines at American's overhaul depot in Tulsa, Oklahoma; that as a result of such negligence, an unairworthy cylinder was installed on one of the engines of the airplane at the overhaul depot; that during the airplane's flight the unairworthy cylinder failed, causing the crash of the airplane and the deaths of petitioners' decedents.

The respondent, United States of America, denied the allegations of negligence and liability and alleged, *inter*

alia, that certain of the petitioners were barred from recovery by reason of payments made to them by American Airlines and releases given to that company.[1] The United States filed a third party complaint against respondent American Airlines, asserting a right of indemnity in the event a recovery was made against the United States. Respondent, American Airlines, Inc., denied that petitioners' complaints stated a claim against the United States upon which relief could be granted; and alleged, *inter alia*, that petitioners' claims were barred by the Missouri statute of limitations of one year and that certain of the petitioners were barred from recovery against the United States by reason of releases given to American Airlines.[2] The actions were thereafter consolidated for trial.

At pre-trial conferences the District Court determined that petitioners had no actionable claims against the United States of America. In accordance with its findings of fact and conclusions of law, the District Court entered its order of Judgment, dismissing the complaints in all four-

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[1] Prior to the commencement of these actions in the District Court, petitioners Richards, Baruck, Maupin, Howe, O'Neal and Hobson settled their claims against American under the Missouri death statute and gave their releases in satisfaction thereof. Decedents Barron and Gates were employees of American, therefore, their widows received workmen's compensation payments in lieu of any claim they might have otherwise had against American under the Missouri death statute. Petitioners Akin, Fields, Cross and Carr-Harris each received payment of the maximum amount permitted under the Missouri death statute, $15,000, by an order of distribution of the District Court of such amounts which had been previously deposited in the registry of the District Court by American. Petitioners Farough and Schmyser did not enter into any settlement agreement with American and since they did not commence any action against American within the time allowed under the Missouri death statute, any claim they might have had against American under Missouri law was time barred.

[2] Since petitioners' claims against American under the Missouri death statute have been settled in twelve actions and time barred in two actions, they concede that they have no actionable claims against the United States under the *Missouri* death statute.

teen actions with prejudice. Upon appeal, the Court of Appeals for the Tenth Circuit, with one Judge dissenting, affirmed the judgment of the District Court.

Holdings of the Courts Below

The crux of the District Court's determination that petitioners had no actionable claim against the United States is set forth in Paragraphs II to VII in its conclusions of law. Because of their conciseness and brevity, they are reproduced in their entirety:

"II. In the actions by plaintiffs against the United States of America, the provisions of the Federal Tort Claims Act, 28 U. S. C. 1346(b) et seq. are applicable.

III. It is unnecessary to decide whether the law applicable to the plaintiffs' claims against the United States of America is that of the State of Missouri or the State of Oklahoma, for in either case the plaintiffs have no actionable claims against the United States of America.

IV. There is no cause of action under the Oklahoma Wrongful Death Statute where an act or omission occurring in Oklahoma results in injury and death in the State of Missouri.

V. If Oklahoma law is applicable under the Federal Tort Claims Act, then the general law of Oklahoma, including the conflicts of law rule, is applicable thereunder.

VI. The Oklahoma conflicts of law rule requires that in the circumstances of these cases the plaintiffs' claims be determinable by reference to the Missouri Wrongful Death Statute.

VII. The plaintiffs have no further claims under the Missouri Wrongful Death Statute for the reason that they have already received full satisfaction for any claims they might have thereunder."

Upon appeal to the Court of Appeals, petitioners argued that the District Court was in error in the following respects: (1) The language of the Tort Claims Act is clear and explicit. If Congress had intended to measure the Government's liability in accordance with the law of the place of the tort, death, wrong, or injury, it could easily have said so; however, it did not. In applying the law of the place of death, Missouri, to petitioners' claims, the District Court completely negated the ordinary meaning of the language actually used by Congress; (2) Since the jurisdiction of the District Court was based upon a federal statute containing its own choice of law rule, the District Court was in error in applying the Oklahoma conflict of laws rule. Its application of the Oklahoma conflicts rule defeated the congressional mandate and intent that the liability of the Government should be determined in accordance with the law of the state where the negligent act or omission occurred; (3) In providing claimants a remedy against the Government, Congress was competent to impose any condition on that remedy it desired, including its own choice of law rule to determine the Government's liability. The choice of law rule specified by Congress in the Act does not change, in any manner, the established law of the states with regard to the application in wrongful death actions of the states' conflict of laws rules or the extraterritorial application of its death statutes, because the choice of law set forth by Congress in the Tort Claims Act can only have application to actions commenced against the United States of America.

The Court of Appeals, in affirming by a divided court, determined that the Oklahoma wrongful death statute could not be applied in the action because the deaths occurred in another state; since the wrongful deaths pleaded in the complaints occurred in Missouri, the Court was "committed to the rule that where wrongful death occurs in one state and an action for damages is instituted in another, the law of the state in which the wrongful death occurred—not that in which the action was instituted—controls in respect to the maximum amount of damages which may be recovered."; and since petitioners were paid the maximum amount under the Missouri Wrongful Death Statute, such payment constituted full satisfaction for the wrongful deaths, the causes of action under the law of Missouri became extinguished, and recovery against the tort feasor or tort feasors was barred.

The dissenting opinion of Chief Judge Murrah stated that the inapplicability of the Oklahoma wrongful death statute to deaths occurring outside of the state does not preclude the right to recover in actions against the United States under the Tort Claims Act, even though a private person would not be liable according to Oklahoma law under the same circumstances; since few, if any, state wrongful death statutes have any extraterritorial effect, Congress could not have intended that the right to recover in multi-state tort situations be dependent upon the extraterritorial effects of the wrongful death statute of the place where the negligent act or omission occurred; that resort to the Oklahoma conflict of laws rule could lead to a situation in which the law of two states would each refer to the law of the other in determining the liability of the Government; that Congress intended to avoid such a situation by providing its own rule as to the proper law to be applied in such cases, that is, the Court should look to the state of the negligent act and no further; if Congress

intended otherwise, it could have simply omitted from the language of the Act the words "in accordance with the law of the place where the act or omission occurred"; by the inclusion of those words, Congress prescribed the law and the conditions under which the Government would become liable.

Reasons for Granting the Writ

I.

The Court of Appeals has decided an important question of law arising under a Federal Statute in conflict with decisions of other Courts of Appeal on the same matter. The question decided below has not been, but should be, decided by this Court.

The question before the Courts below was: What law did Congress intend to be applied to determine the liability of the United States in wrongful death actions commenced against it pursuant to the provisions of the Federal Tort Claims Act, where the wrongful death occurring within the territory of one state is caused by the negligent act or omission of the Government's employees occurring within the territory of another state, the law of the state where the death occurs or the law of the state where the negligent act or omission occurs?

This important and recurring[3] question pertaining to the construction of the Federal Tort Claims Act[4] has been decided by the circuits in a conflicting and confusing[5] manner

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[3] Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232 (1959).

[4] Massachusetts Bonding & Insurance Co. v. United States, 352 U.S. 128, 130 (1956).

[5] Hoffman v. Blaski, 363 U.S. 335, 339 n. 8 (1960).

and without any of the uniformity of application[6] this federal statute requires. In the circuits which have passed on this question since the Act was passed by Congress in 1946, the decisions of the Seventh and District of Columbia Circuit courts in two cases[7] are in direct conflict with the decisions of the Ninth and Tenth circuit courts in three cases.[8] In two of these cases the dissenting judges expressly rejected the majority's holding on this question.[9]

The first case to be decided under the choice-of-law provision in the Federal Tort Claims Act was *Eastern Air Lines, Inc.* v. *Union Trust Co.*, 221 F. 2d 62 (D. C. Cir. 1955) *cert den.*, 350 U. S. 911 (1955). In that case the negligent acts and omissions of the Government's employees located in the C. A. A. control tower in the State of Virginia resulted in the collision of two airplanes and the deaths of passengers in the District of Columbia. The court

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[6] United States v. Schaefer Brewing Co., 356 U.S. 227, 230 (1958).

[7] Voytas v. United States, 256 F. 2d 786 (7th Cir. 1958); and Eastern Air Lines, Inc. v. Union Trust Co., 221 F. 2d 62 (D.C. Cir. 1955), *cert. den.*, 350 U.S. 911 (1955).

[8] United States v. Marshall, 230 F. 2d 183 (9th Cir. 1956); Hess v. United States, 259 F. 2d 285 (9th Cir. 1958), *rev'd on other grounds*, 361 U.S. 314 (1960); and Richards v. United States, —— F. 2d —— (10th Cir. November 25, 1960), Appendix p. 30, *infra*.

[9] Eastern Air Lines, Inc. v. Union Trust Co., 221 F. 2d at 80 (Judge Miller writing for the Court dissented therein on the question of the choice-of-law applicable); Richards v. United States, —— F. 2d ——, Appendix, p. 37, *infra* (Chief Judge Murrah dissented on the ground that the majority view in *Union Trust* should be followed). See also, Cook v. United States, 274 F. 2d 689, 692 (2d Cir. 1960) in which Judge Magruder of First Circuit, sitting by designation, in his dissent on the question of damages indicated strong doubt as to the correctness of the majority view in *Union Trust* on the choice-of-law provision in the Tort Claims Act. However, because the parties agreed by stipulation to be bound by the decision in *Union Trust*, Judge Magruder recognized that holding as the law of the case.

held that since Congress provided in explicit terms for the Government's liability to be measured under the law of the place where its negligent employee's act or omission occurred, the law of Virginia should be applied.[10] In his dissent on this point, Judge Miller interpreted the words "act or omission" to include the consequences of such acts or omission and since the consequences of the acts or omissions were the deaths occurring in the District of Columbia, that law should have been applied.

The District of Columbia Circuit's holding was followed in *Voytas* v. *United States*, 256 F. 2d 786 (7th Cir. 1958). There the alleged negligent acts and omissions occurred in two states, Virginia and Illinois, and the injury and death resulting from such acts and omissions occurred in Illinois. A soldier stole some explosives from his camp in Virginia and, while on leave in Illinois, he gave them to a young boy who used them in a manner which resulted in the death of plaintiff's son. Plaintiff alleged negligent acts and omissions of the Government: (1) in Virginia, in the handling, transporting, storing and guarding of the explosives and in failing to discover that the soldier had the explosives in his possession prior to going on leave, and (2) in Illinois, in the soldier's giving the explosives to the boy. The court looked to the law of Illinois to determine the liability of the Government for the soldier's acts in that state, and it looked to the law of Virginia to determine the liability of the Government for its acts and omissions in Virginia.

A contrary view of the choice-of-law provisions in the Act was first taken by the Ninth Circuit in *United States* v. *Marshall*, 230 F. 2d 183 (9th Cir. 1956). Plaintiff alleged that the negligent acts and omissions of the Government's

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[10] The petition of the Union Trust Compar for a writ of certiorari to review this holding was denied, Union Trust Co. v. United States, 350 U.S. 911 (1955).

employees in loading, labelling and shipping containers of compressed gas, which occurred in the State of Utah, resulted in the explosion of these containers and his injuries in the State of Idaho. The court held that the law of Idaho applied because the words in the Tort Claims Act meant the place where the act or omission "became operative, directly causing the injury and not the places where the negligence existed but was then inoperative." [11]

Two years later, the Ninth Circuit reaffirmed this view in *Hess* v. *United States*, 259 F. 2d 285 (9th Cir. 1958), *rev'd on other grounds*, 361 U. S. 314 (1960).[12] There the appellant conceded that because the decedent's death occurred in the navigable waters of the Columbia River, the general maritime law would apply the wrongful death statute of Oregon to determine the liability of a private defendant. However, appellant contended since the Tort Claims Act makes the Government liable in accordance with the law of the place where the act or omission occurred and the negligent acts of the Government occurred on the dam which is an extension of the Oregon land, the court should apply the Employers' Liability Law of Oregon, as that is the law that would be applied against a private defendant for negligence occurring on the land in that state. The court rejected appellant's contention and the holding of the *Union Trust* case on this issue. Instead, it relied on its previous construction of the language in the Tort Claims Act as set forth in the *Marshall* case. The court also held that the law of the state to be applied is not limited to the

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[11] 230 F. 2d at 187.

[12] Although this Court stated in *Hess*, 361 U.S. at 318 n. 7, that the case did not involve a multi-state tort question, petitioners cite the Ninth Circuit's decision to show that in reaching its decision on the choice-of-law question the Court of Appeals was cognizant of the decision in *Union Trust* on this point.

law having direct reference to tort liability. It includes, also, the state's conflict of laws as in diversity cases.[13]

The Tenth Circuit, in the instant litigation, is the latest court to consider this question, *Richards* v. *United States*, —— F. 2d —— (10th Cir. November 25, 1960).[14] In addition to applying the Oklahoma conflict of laws rule, the court gave a new reason for avoiding the application of the Oklahoma death statute to petitioners' claims. The court held that the Oklahoma wrongful death statute has no extraterritorial effect and that it cannot be applied to actions brought in the courts of Oklahoma for wrongful death occurring outside that state. The dissenting judge was of the opinion that Congress avoided the anomaly which results from the majority view by providing its own choice-of-law rule in the Tort Claims Act. The dissent stated that the majority view in *Union Trust* should have been followed by applying the Oklahoma wrongful death statute.

There is, therefore, not only a conflict in the circuit courts on this multi-state tort question, including the internal conflict in two of the courts in which dissents were filed, but also four separate theories expressed by these courts as to what Congress intended when it stated in the Act that the Government would be liable as if a private person "in accordance with the law of the place where the act or omission occurred." These four theories can be stated as follows:

(1) By use of the words "in accordance with the law of the place where the act or omission occurred," Congress intended to have the Government's liability determined in accordance with the local or internal

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[13] 259 F. 2d at 291.

[14] Appendix, pp. 30-38, *infra*.

law of the state in which the negligent employee was located at the time he was negligent;[15]

(2) The law of the state where the act or omission occurred refers to the law of the state where those acts or omissions became operative directly causing the injury;[16]

(3) That reference to the law of the state where the act or omission occurred includes reference to the entire law of that state, including its conflict of laws rule;[17]

(4) If the law of the state where the negligent act or omission occurred does not apply its wrongful death statute to actions brought in its courts for wrongful death occurring outside that state, such law cannot

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[15] Eastern Air Lines, Inc. v. Union Trust Co., 221 F. 2d 62, 80; Voytas v. United States, 256 F. 2d 786, 788-790; Richards v. United States, —— F. 2d ——, Appendix, *infra*, p. 37 (Murrah, C.J., dissenting). See also, Dalehite v. United States, 346 U.S. 15, 52-53 (1953) (Jackson, J., dissenting); Hatahley v. United States, 351 U.S. 173, 182; Feres v. United States, 340 U.S. 135, 142 (1950).

[16] United States v. Marshall, 230 F. 2d 183, 187; Hess v. United States, 259 F. 2d 285, 290, *rev'd on other grounds*, 361 U.S. 314; Eastern Air Lines, Inc. v. Union Trust Co., 221 F. 2d 62, 80 (Miller, J., dissenting in part).

[17] Hess v. United States, 259 F. 2d at 291; Richards v. United States, Appendix, pp. 30-38, *infra*. See Cook v. United States, 274 F. 2d 689, 692 (Magruder, J., dissenting). See also, Landon v. United States, 197 F. 2d 128 (2d Cir. 1952). In the *Landon* case the negligent act and injury occurred in the same state. In his action in the New York District Court, plaintiff recovered for loss of earnings and hospital expenses, although these were paid by plaintiff's employer under an insurance contract. Under New York law losses compensated by a third party are not allowable as damages against the defendant. The court looked to the whole law of New York, including its conflict of laws rule and determined that New York would look to the law of New Jersey where plaintiff was employed and where the insurance contract was to be performed. Since New Jersey allowed such recovery in tort actions, the judgment was affirmed.

be applied to determine the liability of the Government.[18]

Those few authorities who have written on this subject have not offered any solution to this complex multi-state tort problem.[19] In the cases decided by the district courts little can be obtained to offer a solution to the problem, because while the courts acknowledge that the law of the place of the negligent act or omission is applied, the rule is almost always applied to a case in which the negligent act or omission and the injury occur in the same state.[20]

It is noteworthy that petitioners commenced their actions against the United States, in accordance with venue provisions of the Act,[21] in the Northern District of Oklahoma, the judicial district wherein the act or omission complained of occurred. If the petitioners had exercised the option set forth in that venue statute and commenced their respective actions in the judicial district where each resided, at least three of them[22] would have had the law of Oklahoma applied

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[18] Richards v. United States, Appendix, pp. 30, 35, *infra*.

[19] Goodrich, *Yielding Place to New: Rest Versus Motion in the Conflict of Laws*, 50 Col. L. Rev. 881, 894-895 (1950); Leflar, *Choice of Law; Torts: Current Trends*, 6 Vand. L. Rev. 447, 448 (1953). It is noteworthy that Judge Goodrich has not received any "authoritative answer" from the circuit courts during the ten-year period subsequent to the date of his article, 50 Col. L. Rev. at 895 (1950).

[20] *E.g.*, Moran v. United States, 102 F. Supp. 275 (D.C. Conn. 1951); Modla v. United States, 151 F. Supp. 198 (D.C. N.J. 1957); Irvin v. United States, 148 F. Supp. 25, 28 (S.D. S.D. 1957); Zaccari v. United States, 130 F. Supp. 50, 51 (D. Md. 1955). See also, Olson v. United States, 175 F. 2d 510 (8th Cir. 1949).

[21] 28 U.S.C. § 1402(b).

[22] Petitioners Baruck and O'Neal reside in Illinois and petitioner Howe is a resident of Wisconsin. The district courts of these states are within the Seventh Judicial Circuit and presumably governed by the *Voytas* case, *supra*, note 15.

to determine the liability of the United States; at least two of them,[23] and possibly two others[24] would have had the law of Missouri applied in their cases. Thus, the evil of "forum shopping" is encouraged because of the confusion displayed by the circuit courts in its attempts to determine what Congress intended when it stated that the Government would be liable as if a private person "in accordance with the law of the place where the act or omission occurred."

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[23] Petitioners Hobson and Gates are residents of Colorado and Oklahoma, respectively. Therefore, any appeal they would take from the district court of their residence would be heard by the Tenth Circuit Court of Appeals and presumably governed by the views it stated in the *Richards* decision, Appendix, pp. 30-37, *infra*.

[24] Petitioners Cross and Fields are residents of New York and would probably be governed by the Missouri law, in view of the interpretation of the Second Circuit in the *Landon* case, supra, n. 17. Petitioners Farough and Schmyser reside in Michigan and petitioner Barron is a resident of Tennessee, both of these states being in the Sixth Judicial Circuit. Petitioners Richards and Maupin are residents of Missouri, which is in the Eighth Judicial Circuit. Petitioner Akin resides in Massachusetts, which is in the First Judicial Circuit. Petitioner Carr-Harris is now a resident of Canada, although at the time of her husband's death and for a short time thereafter, she resided in New Jersey and in the Third Judicial Circuit. The First, Third, Sixth and Eighth Circuits have not passed on this precise multi-state tort question.

In a very recent decision of the Third Circuit, Matland v. United States (3d Cir. January 10, 1961) (not officially reported yet, but unofficially reported in *CCH* 7 Avi. 17,144), the court recognized the lack of unanimity of opinion in the federal courts on this question. Although the court was presented with this very question, it concluded that it was not necessary to resolve it because the state law in each case would lead to the same result.

II.

The Courts below have decided an important question of Federal Law in a way which is in conflict with the language and plain meaning of the Act.

The Federal Tort Claims Act provides in explicit terms that the liability of the Government for the negligence of its employees shall be measured "in accordance with the law of the place *where the act or omission occurred.*" (Emphasis added), 28 U. S. C. §1346(b). This phrase is repeated in section 1402(b), which provides that a Tort Claims action may be prosecuted "only in the judicial district where the plaintiff resides or *wherein the act or omission complained of occurred.*" (Emphasis added.) The phrase is again used in 28 U. S. C. §2672, where Congress authorizes administrative settlements of certain claims if the United States is liable "in accordance with the law of the place *where the act or omission occurred.*" (Emphasis added.) It is used still again in 28 U. S. C. §2674, which makes the United States liable for actual or compensatory damages if "the law of the place *where the act or omission* complained of" provides for only punitive damages. (Emphasis added.) Such words are also used in sections 2675 (a), 2676, 2680(a) and 2680(e). The use of the same language shows a deliberate and consistent intent on the part of Congress to have the liability of the Government measured by the law of the place where its employees' negligent acts or omissions occur.

The basic objective in statutory construction is, of course, to ascertain the legislative intent.[23] There is no better or more authoritative guide to that meaning than the language of the statute itself; "if the language be clear,

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[23] Osaka Shosen Kaisha Line v. United States, 300 U.S. 98, 101.

it is conclusive."[26] "The words being clear, they are decisive. There is nothing to construe."[27] It is difficult to conceive of any more explicit or more precise language which could possibly have been used by Congress to command application of the law of the place of the negligent conduct than the words which it did employ. If the congressional intent had not been to measure the Government's liability by the law of the place where the act or omission occurred, but instead was to measure such liability by the law of the place where the tort resulted, it could easily have said so. It could have said that the Government shall be liable "in accordance with the law of the place where the cause of action arose" or "in accordance with applicable state law" or "under circumstances where the United States, if a private person, would be liable to the claimant." However, it did not. Instead, it directed application of the law where the act or omission occurred.

The legislative history and general congressional purpose of the Tort Claims Act have been thoroughly considered in prior decisions of this Court.[28] However, since the specific choice-of-law provision contained in the Act has not been previously considered by this Court, a summary of the legislative background pertaining to this provision will be useful. Most of the earlier tort claims bills[29]

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[26] Ibid.

[27] Van Camp & Sons v. Am. Can Co., 278 U.S. 245, 253.

[28] Dalehite v. United States, 346 U.S. 15, 24-31; Feres v. United States, 340 U.S. 184; United States v. Spelar, 338 U.S. 217. See also, *Hearings before House Committee on the Judiciary, 77th Cong., 2d Sess., on H.R. 5373 and H.R. 6463 (Memorandum, with appendixes, for the use of the Committee on the Judiciary, Explanatory of Committee Print of H.R. 5373, pp. 37-46).*

[29] *E.g.*, S. 2690, 76th Cong., 1st Sess., introduced in 1939. This bill proposed conferring jurisdiction on the courts to determine claims for injury or death "caused by the negligent or wrongful act or omission" of Government employees (Sec. 201). It pro-

did not contain any language as to what law would govern the liability of the Government. The shape of the Act was largely determined during its consideration in the course of the 77th Congress.[30] The first time the "place where the act occurred" language appeared was in the Committee Print of a Committee revision of H.R. 5373, 77th Cong., 2d Sess., Secs. 201, 301. The Committee Reports are inclusive as to the reason for the change, but one thing which is made clear is that the words "place where the act or omission occurred" mean the local law of the place where the negligent act or omission occurred.[31] Additional evidence of congressional intent to have local law determine the Government's liability is clearly shown by an examination of a statement made part of the hearings held by the House

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vided: "In respect to such claims the United States shall be liable to the same extent and in the same manner as a private individual under like circumstances. . . .", but it did not contain the significant language now in § 1346(b), *viz.*, "in accordance with the law of the place where the act or omission occurred." The same was true of H.R. 5299 and H.R. 5373, 77th Cong., 1st Sess., Sec. 201.

[30] United States v. Spelar, 338 U.S. 217, 220 n. 9.

[31] Indicating the difference between H.R. 5373 and the Committee's revision, it is stated (*Memorandum, with appendixes, for the use of the Committee on the Judiciary—Explanatory of Committee Print of H.R. 5373, pp. 42-43* [Emphasis added]):

"The present bill follows closely the pattern of H.R. 7236 and H.R. 5373, *with two important exceptions.* H.R. 7236 vested concurrent jurisdiction over tort claims in the United States district courts and the Court of Claims. The present bill vests exclusive jurisdiction in the district courts sitting without a jury, with an appeal from their decision to the Court of Claims. . . ."

"The other major difference is that the present bill subjects the determination of the validity of the claim, the defenses thereto, and the distribution of the recovery, to the *law of the place where the delinquent act or omission occurred.* H.R. 7236 and H.R. 5373 may, as a matter of law, have embodied the first of these requirements to some extent, but the present bill states this explicitly, and leaves to the *local law* the determination of certain matters specifically treated in H.R. 7236 and H.R. 5373, such as the beneficiaries entitled to the recovery in death cases, the defense of contributory negligence and the like. . . ."

Committee on the Judiciary concerning this Act.[32] The intent to have local law govern liability is also supported by the testimony of Assistant Attorney General Shea during the hearing before the House Committee on the Judiciary on H.R. 6463.[33] The following colloquy appears on P. 30:

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[32] *Hearings before the House Committee on the Judiciary, 77th Cong., 2d Sess., on H.R. 5373 and H.R. 6463, pp. 24-30.* In the discussion of H.R. 6463 and comparison with H.R. 5373 it is stated with respect to administrative adjustments, p. 26: "(2) Under H.R. 5373, it is probable that local law would determine the liability of the United States in suits on tort claims, but nothing is said of administrative settlements. H.R. 6463 makes it clear that local law applies to the administrative determination of such claims as well as to suits thereon. Uniformity in this respect is obviously desirable. . . ."

With respect to suits on tort claims it is stated, p. 26: "Local law is to govern not only the matter of liability but also such defenses as contributory negligence, aggravation of damages, and the like, and the beneficiaries entitled to distribution of the recovery in death cases. . . ."

In distinguishing between H.R. 6463 and H.R. 5373 with respect to litigation of tort claims against the United States, it is said, p. 27: "(2) Conformance to local law is called for by H.R. 6463, not only in respect to the merits of the claim, but also in respect of the availability of defenses and the distribution or disposition of the recovery in cases of death. . . ."

In showing how the bills differed with respect to exemptions of Government liability, it is stated at p. 29: "(1) (ii) Claims arising in a foreign country have been exempted from H.R. 6463, whether or not the claimant is an alien. *Since liability is to be determined by the law of the situs of the wrongful act or omission,* it is wise to restrict the bill to claims arising in this country." (Emphasis added.) It is noteworthy that the words "situs of the tort" or "situs of the injury" were not used, but instead the place of conduct language.

[33] *Supra,* note 32, pp. 30, 35. In a prior statement by Mr. Shea, *Hearings,* etc., p. 9, in response to a question as to the venue of such actions, he said, "Either where the claimant resides, or in the locale of the injury or damage." This is the language which apparently compelled Judge Miller in his partial dissent in the *Union Trust* case, *supra,* to conclude that the *consequence* of the negligent act or omission is to be considered in determining the applicable law. However, Mr. Shea's subsequent testimony on the applicable law during these hearings, pp. 30-36, the written statement introduced at the Hearings, pp. 24-30, and the bill itself

"The Chairman. You may go ahead.

Mr. Shea. H.R. 6463, insofar as it relates to administrative settlements, permits the Federal agencies to consider and determine claims for death, as well as for personal injury and property damage, which was not provided for in the other bill (H.R. 5373).

Under the other bill it was not specifically provided that local law should govern, and certain express provisions were made, for instance, as to distributions.

Mr. Celler. Do you need that? Is that necessary to express it?

Mr. Shea. I should think the earlier bill would probably be construed as applying the local tort law, but this bill specifically covers it, leaving the distribution in case of death and so forth to the local law.

Mr. Celler. The only trouble is in future bills you may have to put that precedent in. If you leave it out the courts may not construe it should apply. I am only thinking out loud to get your reaction.

Mr. Shea. This bill provides explicitly for the application of local law.

The Chairman. Go ahead.

Mr. Shea. . . . Title III provides for suits in the district courts. It differs from the earlier bill in that the liability of the United States in such cases is to be the same as that of a private individual, subject to the limitations of the bill and is to be reviewable by the Court of Claims, which we have discussed. Conformance to local law is explicitly provided for here, as it was not in the prior bill."

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as set forth on pp. 1-6 of the Hearings, make no further reference to such language. In view of the numerous references to the "place of conduct" language and "local law", *supra*, nn. 31-32, it is submitted that the intent of Congress was to apply the law of the state in which the conduct occurred.

It is submitted that such unambiguous and consistent reference to law of the place where the negligent act or omission occurs, evidences clear congressional intent that the Government's liability was intended to be determined in accordance with that law.

The provision of 28 U. S. C. §2674, that the Government shall be liable "in the same manner and to the same extent as a private individual in like circumstances," does not lead to a contrary result. This is clear from the plain meaning of the Act. Counsel for respondent, American Airlines, Inc., argued in the courts below that if Oklahoma law were applied to determine the Government's liability, such liability would not be determined in the same manner and to the same extent as a private individual in like circumstances. The Act, however, clearly dictates that the remedy shall not, in every instance, be coextensive with that available against a private person. There are procedural and substantive differences and departures from the common law.[34]

These restrictions and limitations upon the remedy conferred by the Act, evidencing wide variances from the relief obtainable against a private person is similar circum-

[34] Claimants can only sue in the federal courts, § 1346(b); the Act prescribes its own period of limitations which may be shorter or longer than that of the state in which the tort occurs, § 2401(b), see State of Maryland, to use of Burkhardt v. United States, 165 F. 2d 869 (4th Cir. 1947); the claimant cannot obtain a trial by jury under the Act, although he could against a private defendant, § 2402; he cannot obtain punitive damages under the Act, even though state law may provide for it as against a private defendant, § 2674, see, Massachusetts Bonding & Insurance Co. v. United States, 352 U.S. 128; he cannot obtain interest prior to judgment under the Act, regardless of the state rule governing private defendants, § 2674; the Act excludes claims based on numerous types of torts for which a private person is answerable, § 2680; and the Act exempts the Government from liability for claims based on various types of activities, although a private person would be liable in the same circumstances, § 2680.

stances, simply illustrate the settled principle that in consenting to suit against the Government, Congress may impose any conditions it chooses upon the right to sue and upon the nature of the remedy. The Tort Claims Act's requirement of application of the law of the place where the act or omission occurred, rather than the application of the law of the place of the act's consequences, is but another variance which Congress chose to insert.

In its opinion the Court of Appeals expressly recognized this principle, *viz,* that the Tort Claims Act provided its own choice-of-law rule and that the Act was not silent in this area. It also acknowledged that Congress took effective action to make a *different* rule applicable to the Government in cases involving multi-state torts. Yet, it completely ignored the plain meaning of the language actually used by Congress. Instead, it said it was "committed" to a rule which is nearly always applied in multi-state tort actions between private parties. It is submitted, therefore, that this complete disregard of the congressional mandate on the law to be applied in such cases was clearly error.

III.

By applying the Oklahoma conflict of laws rule and the rule that the Oklahoma wrongful death statute can have no extraterritorial application to a death occurring in another state, the Courts below completely negated the intent of Congress to determine the liability of the Government in accordance with the law of the place where the act or omission occurred.

By express provision of the Act,[35] its terms and conditions can only be applied in civil actions wherein the United

[35] 28 U.S.C. § 1346(b). "Subject to the provisions of Chapter 171 . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . ."

States is the defendant. It has no application to actions between private persons. The Act does not create a new cause of action.[36] It merely waives sovereign immunity from suit for certain torts of federal employees.[37] The primary purpose of the Act was to extend a remedy to those who had been without one.[38] Although the State of Oklahoma created a statutory right and a remedy to recover damages for wrongful death[39] in actions against private defendants, it is plain that it did not and could not provide such a remedy to those persons having wrongful death claims against the United States of America. Only Congress could provide that remedy, which it did in enacting the Federal Tort Claims Act.[40]

It is clear, therefore, that the application of the Oklahoma wrongful death statute to petitioners' claims in accordance with the language of the Tort Claims Act, does not change in any manner the established law prevailing in Oklahoma concerning its wrongful death statute. The courts in Oklahoma, and the federal district courts in diversity actions, will still be free to apply the Oklahoma conflict of laws rule, or its rule as to non-extraterritorial application of its death statute, in a wrongful death action against private defendant based upon a death occurring in Missouri. The mere fact that Congress chose to make a different rule apply in the federal courts to actions commenced against the Government should be of no concern to the State of Oklahoma, or any other state for that matter, since in so doing, Congress did not intend the Act to affect the states' jurisdiction in such actions against private defen-

[36] Feres v. United States, 340 U.S. 135, 141 (1950).

[37] Dalehite v. United States, 346 U.S. 15, 17 (1953).

[38] *Supra*, note 36, at 140.

[39] F. W. Woolworth Co. v. Todd, 204 Okl. 532.

[40] *Supra*, note 38.

dants. Therefore, with respect to wrongful death actions against the Government under the Tort Claims Act, it would not make any difference what construction the state courts would give to the application of its death statutes where a death occurs in another state, because Congress chose to make a different rule applicable to the Government in such actions.[41]

It would be difficult to conceive that Congress, at the time this Act was passed, did not have in mind the general rule of conflict of laws[42] usually applied in such cases by most jurisdictions. It would be equally difficult to impute to that body any suggestion that it did not know that few, if any, state wrongful death statutes have any extraterritorial application. If, therefore, Congress intended to have the Government's liability depend upon the general conflict of laws rule or the extraterritorial effect of the wrongful death statute of the state where the negligent act occurred, the Tort Claims Act would be inapplicable in all actions involving multi-state torts. Surely, Congress could not have intended to provide the remedy to one class of claimants and withhold it from another.

Yet, this result stems from the holdings of the Courts below in the instant actions. Petitioners have been denied the opportunity to obtain a determination of the merits of their respective claims against the United States in accordance with the clear intent of Congress as contained in the Federal Tort Claims Act. In short, the remedy provided by Congress has been withheld from petitioners because the deaths of their respective decedents did not occur in the same state in which the Government was negligent.

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[41] State of Maryland, to use of Burkhardt v. United States, 165 F. 2d 869 (4th Cir. 1947).

[42] See, e.g., Hunter v. Derby Foods, 110 F. 2d 970 (2d Cir.), Restatement, *Conflict of Laws*, §§ 377-78 (1934); Goodrich, *Conflict of Laws*, 263-64 (1949).

PRAYER

For the foregoing reasons, petitioners pray that this petition be granted to the end that these cases may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed, and that petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

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BERNICE L. MAUPIN,
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APPENDIX

28 U. S. C. §1346(b) provides as follows:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U. S. C. §1402(b) provides as follows:

> Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred. June 25, 1948. c. 646. 62 Stat. 937.

28 U. S. C. §2672 provides, in pertinent part, as follows:

> The head of each federal agency, or his designee for the purpose, acting on behalf of the United States, may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States accruing on and after January 1, 1945, for injury or loss of property or personal injury or

death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U. S. C. §2674 provides as follows:

LIABILITY OF UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c. 646, 62 Stat. 983.

12 Okl. St. Ann. §1053, provides as follows:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission. The action must be commenced within two years. The damages must inure to the exclusive benefit of the surviving

spouse and children, if any, or next of kin; to be distributed in the same manner as personal property of the deceased. As amended Laws 1943, p. 35, § 1.

Chapter 537 V. A. Mo. S. §537.080 (Section 3653, R. S. Mo. 1939), provided on August 4, 1955, as follows:

LIABILITY FOR WRONGFUL DEATH GENERALLY

Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who or the corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured. (R. S. 1939, §3653)

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Nos. 6378 to 6391—November Term, 1960

(Argued September 14, 1960 Decided November 25, 1960)

Docket Nos. 6378-6391

SUZANNE THOMAS RICHARDS, nee WADLOW, individually and for the use and benefit of DEBRA SUE RICHARDS, *et al.*,

Appellants,

—v.—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,

Appellees.

(November 25, 1960)

JOSEPH A. SHARP (Speiser, Quinn & O'Brien, Edward M. O'Brien; Rucker, Tabor, Best, Sharp & Shepherd, Truman B. Rucker and O. H. "Pat" O'Neil were with him on the brief) *for Appellants.*

SHERMAN L. COHN, Department of Justice Attorney, (George Cochran Doub, Assistant Attorney General; B. Hayden Crawford, United States Attorney; and Morton Hollander, Department of Justice Attorney, were with him on the brief) *for Appellee, United States of America.*

FRED M. MOCK (W. B. Patterson and Melvin F. Pierce were with him on the brief) *for Appellee, American Airlines, Inc.*

Before MURRAH, *Chief Judge*, and BRATTON and PICKETT, *Circuit Judges*.

BRATTON, *Circuit Judge*.

A passenger airplane owned and operated by American Airlines on a regularly scheduled flight crashed in Missouri and everyone on board was killed. Invoking pertinent provisions of the Federal Tort Claims Act, 28 U. S. C. §§1346, 1402, and the so-called Wrongful Death Statutes of Oklahoma, O.S. 1951, Title 12, chapter 17, §1051, *et seq.*, survivors or legal representatives of passengers who lost their lives instituted in the United States Court for Northern Oklahoma fourteen separate actions against the United States for the recovery of damages. The basis of the claim pleaded in each case was negligence on the part of the United States, acting through the Civil Aeronautics personnel, in permitting American Airlines to employ and use unsafe practices and procedures at its overhaul depot at Tulsa, Oklahoma, in repairing, rebuilding, overhauling, and inspecting its aircraft, aircraft engines, and component parts. More specifically, it was pleaded that as the result of such negligence, an unfit and unsafe cylinder was placed in one of the engines of the airplane at the overhaul depot; that the cylinder failed; and that such failure caused the crash. The United States denied negligence; denied liability; pleaded that the accident was an unavoidable casualty; pleaded that the complainants were barred from recovery against the United States by reason of payments made to them by American Airlines and releases given to such company; and pleaded in the alternative that the amounts paid should be taken into account in mitigation of

damages against the United States. And by third party complaints, the United States asserted against American Airlines a right of indemnity in the event of recovery against the United States. American Airlines pleaded that the complaints failed to state a cause of action against the United States; pleaded that the deaths were an unavoidable casualty; pleaded that the actions were barred by the statutes of limitation of Missouri; and pleaded that certain of the complainants were barred from recovery against the United States by reason of releases given to American Airlines. The actions were consolidated for trial. In some of the cases, American Airlines made payment in each case of $15,000 to the complainants and releases and satisfactions of liability were executed. In the other cases, American Airlines during the course of a pre-trial conference tendered to the complainants in each case $15,000. Following the pre-trial conference, findings of fact and conclusions of law were made; and judgments were entered dismissing the actions.

The cases present a situation in which the alleged wrongful acts and conduct on the part of the United States occurred in Oklahoma and the deaths of the decedents occurred in Missouri. While it would be trite in ordinary circumstances to do so, it may be appropriate in this case to say that, in the absence of a controlling statute providing otherwise, the general rule is that where an act of omission or commission occurs at one place and resulting death, personal injury, or damage takes place at another, the situs of the actionable wrong is the place at which the death, personal injury or property damage takes place. *Betts* v. *Southern Railway Co.*, 71 F. (2d) 787; *Hunter* v. *Derby Foods*, 110 F. (2d) 970; *Lowry* v. *International Brotherhood, etc.*, 220 F. (2d) 546; *Eastern Air Lines* v. *Union Trust Co.*, 221 F. (2d) 62, certiorari denied, 350 U. S. 911; *Orr* v. *Sasseman*, 239 F. (2d) 182; *Cameron* v. *Vandegriff*,

53 Ark. 381, 13 S. W. 1092; *Strogoff* v. *Motor Sales Co.*, 302 Mass. 345, 18 N. E. (2d) 1016; *Dallas* v. *Whitney*, 118 W. Va. 106, 188 S. E. 766; *Conklin* v. *Canadian-Colonial Airways*, 266 N. Y. 244, 194 N. E. 692; *Hughes Provision Co.* v. *La Mear Poultry & Egg Co.* (Mo. App.), 242 S. W. (2d) 285; *Gaston* v. *Wabash Railroad Co.* (Mo.), 322 S. W. (2d) 865; *Mann* v. *Policyholders' National Life Insurance Co.*, 78 N. D. 724, 51 N. W. (2d) 853. See also Restatement, Conflict of Laws §377. And that rule has been applied in cases in which the act of omission or commission in respect to a passenger airplane occurred at one place while the resulting accident and death took place at another. *Faron* v. *Eastern Airlines*, 84 N. Y. S. (2d) 568; *Riley* v. *Capital Airlines*, 199 N. Y. S. (2d) 515. It is readily conceivable that solution of the problem could be more difficult in a case in which the initial act of omission or commission occurred at one place, personal injury at another, and resulting death later at a third. But no situation of that kind is presently presented.

If the Tort Claims Act were silent in respect to the matter and the general rule to which reference has been made had application with controlling effect, it seems clear that the situs of the actionable wrong involved in these cases would be in Missouri and the liability of the Government to respond in damages would be referrable to the substantive law of that state. But the Tort Claims Act is not silent in that area. For reasons of its own choice, Congress took effective action to make a different rule applicable to the Government in such cases. Title 28, section 1346(b), United States Code, authorizes suits against the Government for death caused by the negligent or wrongful act of an employee of the Government while acting within the scope of his employment if a private person would be liable in accordance with the law of the place at which such act or omission occurred. And Title 28, section 2674, provides in

presently pertinent part that the Government shall be liable in respect to the provisions of the title relating to tort claims in the same manner and to the same extent as a private person under like circumstances. When construed together, the effect of the two provisions in a case in which the act or omission occurs at one place and the resulting death at another is to subject the Government to liability according to the tests and standards of the substantive law of the state in which the act or omission occurred. Except when expressly provided otherwise in the Act itself, the effect of the two provisions in a case in which the act or omission occurs at one place and resulting death at another is to equate the liability of the Government with that of a private litigant under the substantive law of the state where the act or omission of the employee of the Government occurred. *Eastern Air Lines* v. *Union Trust Co., supra; Voytas* v. *United States,* 256 F. (2d) 786. Concededly, a contrary view was expressed in *United States* v. *Marshall,* 230 F. (2d) 183, and *Hess* v. *United States,* 259 F. (2d) 285, vacated on grounds not germane here, 361 U. S. 314. But we are persuaded that our view finds adequate support in the Act.

The Supreme Court of Oklahoma has had occasion to observe from time to time that at common law the wrongful death of a person did not create a right of action for damages; and that the right of action in that state is purely statutory. *F. W. Woolworth Co.* v. *Todd,* 204 Okl. 532, 231 Pac. (2d) 681; *Gochenour* v. *St. Louis San Francisco Railway Co.,* 205 Okl. 594, 239 Pac. (2d) 769; *Herndon* v. *Dolton-Barnard Hardware Co.* (Okl.), 289 Pac. (2d) 970; *Mathies* v. *Kittrell* (Okl.), 350 Pac. (2d) 951. The right of action in that state is created by 12 O.S. 1951 §1053. The statute provides in substance that when the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, or his personal representative if he

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. ~~753~~ 59

SUZANNE THOMAS RICHARDS, nee Wadlow, individually and for the use and benefit of DEBRA SUE RICHARDS, ET AL.,
Petitioners,

—against—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN AIRLINES, INC., IN OPPOSITION

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American Airlines, Inc.

UTTERBACK TYPESETTING CO 13 SO WALKER OKLAHOMA CITY PH CE 5-8750

is also deceased, if the former might have maintained an action had he lived, against the latter, or his representative, for an injury for the same act or omission; it further provides that the damages shall inure to the persons named; and it further provides the manner in which such damages shall be distributed. The statute in its entirety creates a new right of action, specifies the persons who may maintain the action, and blueprints the distribution of the damages recovered in the action. *Gochenour* v. *St. Louis San Francisco Railway Co., supra.* But it does not indicate directly or indirectly a legislative intent or purpose to undertake to create a cause of action for wrongful death occurring in another state. Neither does it suggest an intent or purpose to make it apply to actions brought in the courts of Oklahoma for wrongful death occurring outside the state. Standing alone, it is limited in effect to wrongful deaths which occur in Oklahoma. However, assuming that it is brought in the name of the proper party plaintiff, against the proper party defendant, with jurisdiction over the person of the defendant, a transitory action for wrongful death occurring in another state may be maintained in the courts of Oklahoma if the substantive law of such other state creates a right of action for wrongful death and provides for a transitory action for damages as the remedy. An action of that kind in the courts of Oklahoma is not one under the domestic statute of Oklahoma relating to wrongful death. It is one for the enforcement of a right of action having its source in the law of the state in which the wrongful death occurred. *Chicago, Rock Island & Pacific Railway Co.* v. *McIntire,* 29 Okl. 797, 119 Pac. 1008; *McCoubrey* v. *Pure Oil Co.,* 179 Okl. 344, 66 Pac. (2d) 57; *Gochenour* v. *St. Louis San Francisco Railway Co., supra; Fenton* v. *Sinclair Refining Co.,* 206 Okl. 19, 240 Pac. (2d) 748.

It was pleaded in the complaints in these cases that the actions arose under the Tort Claims Act, *supra;* and that

they were brought under the Wrongful Death Statutes of Oklahoma, *supra*. No reference was made in the complaints to the laws of Missouri respecting wrongful death. But since the wrongful deaths pleaded in the complaints occurred in Missouri, we take occasion to explore the question whether a cause of action was pleaded for which the complainants were entitled to relief by way of damages under the laws of that state. A right of action for wrongful death exists by statute in Missouri. *Nelms* v. *Bright* (Mo.), 299 S. W. (2d) 483. Quite similar to the wrongful death statute of Oklahoma, *supra*, at the time of the airplane crash referred to herein, it was provided by statute in Missouri that when the death of a person was caused by a wrongful act, neglect, or default of another, and such act, neglect, or default was such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages therefor, an action for damages might be maintained, notwithstanding the death of the person injured. R. S. Mo. 1939, §3653. And at the time of such airplane crash, it was further provided by statute in Missouri that damages not to exceed $15,000 might be awarded for wrongful death. R. S. Mo. 1939, §3654. No limitation in respect to amount of damages is provided by statute in Oklahoma. But in creating the statutory right of action for wrongful death, it was competent for Missouri to fix the maximum amount of damages recoverable in an action under such statute. And this court is committed to the rule that where wrongful death occurs in one state and an action for damages is instituted in another, the law of the state in which the wrongful death occurred—not that in which the action was instituted—controls in respect to the maximum amount of damages which may be recovered. *Stoltz* v. *Burlington Transportation Co.*, 178 F. (2d) 514, certiorari denied, 339 U. S. 929; *Burlington Transportation Co.* v. *Stoltz*, 191 F. (2d) 915.

The maximum recovery of damages under Missouri law at the time of the airplane crash being $15,000, payment of that amount to the complainants in some of these cases and the deposit of that amount in the registry of the court in the other cases, constituted full satisfaction for the wrongful deaths, the causes of action under the law of Missouri became extinguished, and recovery against the tort feasor or tort feasors was barred. *Hanson* v. *Norton*, 340 Mo. 1012, 103 S. W. (2d) 1.

The judgments of dismissal are severally affirmed.

MURRAH, *Chief Judge*, dissenting:

I agree that the government is liable in these cases as a private person in accordance with Oklahoma law, i.e., the place where the alleged negligent act or omission occurred. I also agree that the inapplicability of the Oklahoma wrongful death statute to deaths outside the state does not preclude the right to recover in cases like these, even though a private person would not be liable according to Oklahoma law under the same circumstances.

We know that few, if any, state wrongful death statutes have any extraterritorial effect. If, therefore, the right to recover under the Tort Claims Act in cases like these is made to depend upon the extraterritorial effect of the wrongful death statute of the place of the negligent act, the Act would be inapplicable to all such cases. Surely Congress did not intend any such anomalous result.

The majority avoids this blind spot in the law by resort to the Oklahoma conflict of laws rule, which authorizes maintenance of a suit in Oklahoma for wrongful death occurring outside the state, in accordance with the law of the state where death resulted. And see *Fenton* v. *Sinclair Refining Co.*, 240 P. 2d 748. The effect of this process of reasoning is to apply the substantive law of the place of death rather than the law of the place of the negligent act.

The end result seems contrary to our agreed interpretation of the Tort Claims Act. Indeed, under this theory, these suits might have been instituted and maintained in any forum which authorizes them, with liability governed by the law of the place where death occurred, i.e., Missouri. Thus, if the suits had been commenced in Missouri, the Missouri court would have looked to the law of Oklahoma as the place where the negligent act occurred, and the Oklahoma conflicts rule would apply the law of Missouri as the place where death occurred.

In my view, Congress intended to avoid this circuitous stacking of one conflicts rule on another in order to arrive at controlling substantive law. Rather, it is my view that the Tort Claims Act provides its own conflicts rule, that is, the law of the place of the negligent act. In other words, we rest upon the law of that state and look no further. If Congress had intended otherwise, it could have simply conferred jurisdiction upon the courts to hear and decide claims for damages for death caused by the negligence of the United States "under circumstances where the United States, if a private person, would be liable to the claimant" and stopped there. In this setting, these suits would be maintainable in Oklahoma in accordance with the law of Missouri, by virtue of the Oklahoma conflicts rule, that is, the law of the place where the accident occurred. When, however, Congress went on to say in effect that the government would be liable to the claimant as if a private person "in accordance with the law of the place where the act or omission occurred," it thereupon removed the traditional cloak of immunity and left the government standing as a private person, but prescribed the law and the conditions under which it would become liable.

Such is the import and result of *Eastern Airlines* v. *Union Trust Co.*, 221 F. 2d 62. I would follow the majority view in that case and apply the Oklahoma wrongful death statute.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Tenth Day, November Term, Friday, November 25th, 1960.

Before:

HON. ALFRED P. MURRAH,
Chief Judge,

HON. SAM G. BRATTON,
HON. JOHN C. PICKETT,
Circuit Judges.

SUZANNE THOMAS RICHARDS, nee WADLOW, individually and for the use and benefit of DEBRA SUE RICHARDS, *et al.*,

Appellants,

—v.—

UNITED STATES OF AMERICA, and AMERICAN AIRLINES, INC.,

Appellees.

These causes came on to be heard on the transcript of the record from the United States District Court for the Northern District of Oklahoma and were argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgments of dismissal are severally affirmed.

ROBERT B. CARTWRIGHT
Clerk

Judgment

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civil Action Nos. 4272 through 4285

SUZANNE THOMAS RICHARDS, nee WADLOW, individually and for the use and benefit of DEBRA SUE RICHARDS, *et al.*,

Plaintiffs,

—VS.—

UNITED STATES OF AMERICA,

Defendant.

UNITED STATES OF AMERICA,

Third Party Plaintiff,

—VS.—

AMERICAN AIRLINES, INC.,

Third Party Defendant.

Findings of Fact

In accordance with the stipulations heretofore entered into between the parties, the Court finds as follows:

I.

That the suits by plaintiffs against United States of America allegedly arise under the terms of the Federal Tort Claims Act, 28 U. S. C. 1346 et seq. and allegedly are

brought under the Oklahoma Wrongful Death Statute, to wit: 12 O.S. Sec. 1051, et seq.

II.

That, in the actions brought by plaintiffs against American Airlines, there is diversity of citizenship between the parties.

III.

Convair Airplane 240, registration No. N-94221, was owned and operated by American Airlines and, on the 4th day of August 1955, was being operated by American Airlines as Flight 476 when it crashed at Fort Leonard Wood, Missouri.

IV.

That, at the time of the crash, the airplane was being operated by Captain Hugh Barron, as pilot, and William Grover Gates, as co-pilot. That Hugh Barron and William Grover Gates were employees of American Airlines at the time of the crash and were fatally injured as a result of the crash.

V.

That Harold M. Fields, Morris W. Akin, Kurt D. Richards, Samuel H. Hobson, Robert I. Zelens, John Leland Cross, Jr., James Howe, Wayne Howe, Donald L. Carr-Harris, Virgil D. Maupin, Tilson J. Farough, Herman F. Schmyser and William E. O'Neel were all fare paying passengers, lawfully aboard American Airlines Flight 476, and all perished in the crash occurring at Fort Leonard Wood, Missouri.

VI.

That the death of the crew members and all fare paying passengers occurred within the State of Missouri.

VII.

That plaintiffs allege negligence on the part of the United States of America, occurring prior to the 4th day of August, 1955, at the American Airlines Overhaul Depot located at Tulsa, Oklahoma, which they allege was the proximate cause of the crash and deaths of the members of the crew and fare paying passengers.

VIII.

That plaintiffs have received full satisfaction of any cause of action they may have under the terms and provisions of the Wrongful Death Statute of the State of Missouri.

Conclusions of Law

In accordance with the above Findings of Fact, the Court determines as follows:

I.

The Court has jurisdiction of the parties and the subject matter of these actions.

II.

In the actions by plaintiffs against the United States of America, the provisions of the Federal Tort Claims Act, 28 U. S. C. 1346(b) et seq. are applicable.

III.

It is unnecessary to decide whether the law applicable to the plaintiffs' claims against the United States of America is that of the State of Missouri or the State of Oklahoma, for in either case the plaintiffs have no actionable claims against the United States of America.

IV.

There is no cause of action under the Oklahoma Wrongful Death statute where an act or omission occurring in Oklahoma results in injury and death in the State of Missouri.

V.

If Oklahoma law is applicable under the Federal Tort Claims Act, then the general law of Oklahoma, including its conflicts of law rule, is applicable thereunder.

VI.

The Oklahoma conflicts of law rule requires that in the circumstances of these cases the plaintiffs' claims be determinable by reference to the Missouri Wrongful Death statute.

VII.

The plaintiffs have no further claims under the Missouri Wrongful Death Statute for the reason that they have already received full satisfaction of any claims they might have thereunder.

VIII.

The complaints in the above action should be dismissed with prejudice.

IX.

Since the complaints against the United States are to be dismissed, it is unnecessary to pass upon the third party complaints asserted by the United States against American Airlines.

Order of Judgment

In accordance with the above findings of fact and conclusions of law, the complaints in the above actions are hereby dismissed with prejudice.

RAYMOND H. SAVAGE
Judge

Approved:

SPEISER, QUINN & O'BRIEN
RUCKER, TABOR & COX

By JOSEPH A. SHARP
Attorneys for Plaintiffs

RHODES, CROWE, HIERONYMUS & HOLLOWAY

By
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ROBERT RIZLEY
(Illegible)

By RUSSELL H. SMITH
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PIERCE, MOCK & DUNCAN, COUCH & HENDRICKSON
JACKSON, WALKER, WINSTEAD, CARTWELL & MILLER

By W. B. PATTERSON
Attorneys for American Airlines, Inc.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF OKLAHOMA, *ss*

I hereby certify that the foregoing is a true copy of the original on file in this court.

NOBLE C. HOOD, Clk.

By M. M. Ewing
Deputy